In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~745~~ 45

RAYONIER INCORPORATED, a corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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On page 2 of their Brief, Government counsel state three questions presented. While those questions are among the many raised in this case, we do not accept them as the sole questions nor in derogation of those stated in our Petition for Certiorari. Some discussion of the Government's questions 1 and 2 is in order.

PROXIMATE CAUSE

Proximate cause is a question of fact, not a question of law except in rare circumstances. It should be determined by the trier of the facts. *McInnis v. Squires* (1925) 136 Wash. 10, 238 Pac. 925; *McLeod v. Grant County School District* (1953) 42 Wn.2d 316, 255 P.2d 360; *Fleming v. Seattle* (1954) 45 Wn.2d 477, 483, 275 P.2d 904; *Palin v. General Construction Co.* (1955) 147 Wash. Dec. 223, 287 P.2d 325. Paragraph XXXVI of

the Complaint (R. 29) alleges that each of the acts of negligence described in the Complaint was a direct and proximate cause of the damage. That is sufficient under the Rules of Civil Procedure, Rules 8(e) and (f), and Forms 9 and 10, approved by Rule 84.

The Opinion is obscure and confusing on the question of proximate cause, intervening force and termination of risk. It says, Appendix D, p. 55:

> " * * * In our opinion it was this *recurrence* of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * * " (Emphasis added)

Why was such "recurrence" of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract. It would not have reached the 1600-acre tract nor even have started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment of the fire, terminate and what caused them to terminate? The Opinion does not explain. But its necessary implication is that when one responsible for the start of a fire has it contained and under control his duty has ended and the risk of fire has thereby terminated. That is contrary to Washington law.

The Washington statutes[1] establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Half-way measures are no more tolerated by Washington forestry laws.

The authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforeseeable intervening forces and superseding cause. They are not applicable to the case at bar because the Complaint here specifically alleges that everything countributing to the September 20 breakaway fire was foreseeable and could have been guarded against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government-owned and controlled right of way and adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The opinion quotes paragraph XXXII of the Com-

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[1]Am. Rem. Supp. 1945 §5806, R.C.W. 76.04.380. Appendix B, p. 35.
Am. Rem. Supp. §5807, R.C.W. 76.04.370. Appendix B, p. 36.
Rem. Rev. Stat. §2523, R.C.W. 76.04.220. Appendix B, p. 26.
Rem. Rev. Stat. §5818, R.C.W. 76.04.450. Appendix B, p. 38.

plaint, which describes the Forest Service doing nothing, and then simply says, Appendix D, p. 56:

> "On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract."

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner it will be held accountable, but if it is negligent twice, once as a landowner and later as a public fireman, it will not be liable at all.

CHARACTER OF RAILROAD RIGHT OF WAY

As they did in their brief to the Court of Appeals, Government counsel again mistakenly characterize the right of way which Port Angeles Western Railroad had across Government lands as one granted by the Government under the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §934 (Brief p. 12). This is misleading, outside the record, erroneous in fact and contrary to the allegations of the Complaint. The easement was *not* granted under the Right of Way Act of March 3, 1875.

The Complaint says (R. 11) that "defendant owned, had control of and free and unrestricted access to" the land where the fire started, including the right of way. That allegation must be accepted as true. Under it we are entitled and prepared to prove that such right of way as existed was granted years ago by a private party, the then owner of the right of way area and adjoining lands, to another private party; that the United States thereafter acquired the servient estate and ad-

joining lands in an exchange transaction with the private owner; and that still other agreements and relationships between the Government and the Railroad gave the Government control of the right of way even to the extent of suspending operations thereon.

The cases cited by Government counsel as defining the rights and obligations of parties under the Right of Way Act of March 3, 1875, simply are not applicable to the case at bar. The railroad cases cited by Government counsel on page 13 of the opposing brief are cases in which the injured plaintiff, typically the adjacent land owner whose barn has burned, has elected to sue the solvent railroad and has not been concerned about the liability of the servient owner. As a matter of fact, the railroads in these cases may have owned their rights of way in fee for all we are able to discover from the opinions. The other cases cited on pages 12, 13 and 14 deal with rights and obligations as between the owners of the dominant and servient estates. They do not deal with the obligations of the owner of the servient estate to third parties. It does not matter here whether the Government could look to the Port Angeles Western Railroad for indemnity against liabilities incurred by the Government. This suit involves the right of a third party who was damaged by negligent conditions and practices on Government-owned and controlled lands.

If we follow counsels' argument correctly it is their contention that the owner of timber land could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land simply by granting an easement across that land.

That is patently unsound. The owner of land cannot escape his obligations and duties to maintain it in a safe condition unless he parts with all right of control or access to the land. The owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement.

We respectfully ask that the Petition for Certiorari be granted.

Respectfully submitted,

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